No. 08-1084
Capital Case

In The
Supreme Court of the United States

MICHAEL ANTHONY TAYLOR,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

Past Litigation

The grand jury charged petitioner Michael Taylor in the Circuit Court of Jackson County, State of Missouri, with one count of murder in the first degree, in violation of §565.020, RSMo. 1994; one count of the felony of armed criminal action, in violation of §571.015, RSMo. 1994; one count of the Class B felony of kidnapping, in violation of §565.110, RSMo. 1994; and one count of the felony of forcible rape, in violation of §566.030, RSMo. Cum. Supp. 1993. On June 11, 1990, the State filed an information in lieu of indictment charging petitioner as a prior, persistent and Class X offender.

On February 8, 1991, petitioner appeared with his attorneys before the Honorable Alvin C. Randall and expressed his desire to enter a plea of guilty to the charges in open court and on the record pursuant to Missouri Supreme Court Rule 27.01(b). After a three-day punishment phase hearing, Judge Randall sentenced petitioner to death. Petitioner also received sentences of life imprisonment for rape, fifteen years imprisonment for kidnapping, and ten years imprisonment for armed criminal action, all terms to run consecutively.

Petitioner brought a post-conviction action pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and sentence. Because of the allegations contained in his post-conviction pleadings, the entire bench in the Sixteenth Judicial Circuit in Jackson County recused itself from the post-conviction litigation by order of the presiding

judge, and the Missouri Supreme Court appointed Special Judge Robert H. Dierker, Jr. After an extensive evidentiary hearing, mostly centered on the issue of Judge Randall's alleged drinking during the sentencing proceeding, Judge Dierker denied petitioner's post-conviction motion.

A consolidated appeal challenging the guilty plea, the imposition of the death penalty, and the denial of the Rule 24.035 motion for post-conviction relief came to the Missouri Supreme Court alleging some fifteen claims of error. After the case was fully briefed by the parties, and after hearing oral argument in the matter, the Missouri Supreme Court issued the following order on June 29, 1993:

ORDER

> Judgment vacated. Cause remanded for new penalty hearing, imposition of sentence, and entry of new judgment.

(Appendix – hereinafter App. 1a).

On January 11, 1994, petitioner filed a motion in the trial court to withdraw his guilty plea (App. 94a); he filed suggestions in support of this motion on January 20, 1994 (App. 99a). After denial by the trial court, petitioner filed a motion for reconsideration of petitioner's motion to withdraw his guilty plea, which was denied on April 8, 1994 (App. 9a, 107a). Immediately before resentencing, defense counsel reasserted petitioner's motion and argued its merits before the trial court, which it denied.

Petitioner's second sentencing hearing began on May 2, 1994, and the court heard evidence for three days. The evidence was held open for over a month, and petitioner presented the testimony of additional witnesses on May 12, 1994 and June 6, 1994. The State adduced evidence concerning the abduction and murder of Ann Harrison, as well as evidence of an escape from custody by petitioner. The defense called ten witnesses in purported mitigation of punishment, including three witnesses who testified about petitioner's mental condition and the effects of his drug and alcohol abuse, a minister who was opposed to the death penalty, a Catholic brother who had witnessed an execution by lethal injection, and numerous relatives of petitioner who recounted his relatively normal background and upbringing. In addition, Judge Coburn agreed to consider testimony of four witnesses from prior proceedings: Professor Nunn, an expert in the study of patterns of racial discrimination in the imposition of the death penalty; Dr. Patricia Fleming, a psychologist who testified as to her mental health evaluation of petitioner; the Reverend Albert Johnson, petitioner's minister; and Kareem Hurley's testimony from co-defendant Nunley's second sentencing proceeding.

On June 17, 1994, over three years after he had first received the penalty of death, petitioner appeared before Judge Coburn for formal sentencing. In oral and written findings, Judge Coburn found six statutory aggravating circumstances beyond a reasonable doubt, as well as three non-statutory aggravating circumstances. Judge Coburn found the existence of one mitigating circumstance, rejecting several others offered by petitioner, and concluded

that the mitigating circumstance did not outweigh the aggravating circumstances of this case, making the sentence of death appropriate. Petitioner also received fifty years for armed criminal action, fifteen years for kidnapping, and life imprisonment for rape, all terms to run consecutively (App. 121a). Petitioner filed an appeal.

On September 15, 1994, petitioner filed his pro se motion for state post-conviction relief pursuant to Missouri Supreme Court Rule 24.035, challenging his guilty plea and challenging his second sentencing proceeding and sentence of death. Appointed counsel filed an amended petition on December 27, 1994. The circuit court held an evidentiary hearing on May 18, 1995, wherein petitioner presented evidence almost exclusively on the issue of ineffective assistance of counsel for failing to investigate and present sufficient mitigating evidence. On June 20, 1995, the motion court issued findings of fact and conclusions of law denying petitioner's Rule 24.035 motion (App. 129a).

Because petitioner pled guilty, his consolidated appeal was limited to the Missouri Supreme Court's mandatory sentence review (proportionality), §565.035.5, RSMo. 1994, and review of the denial of the motion to withdraw plea and the denial of post-conviction relief. The Missouri Supreme Court affirmed (App. 167a). State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996). This Court denied discretionary review. Taylor v. Missouri, 519 U.S. 1152 (1997).

Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. The district court

denied the petition; the United States Court of Appeals for the Eighth Circuit affirmed; and this Court denied further review. Taylor v. Bowersox, 329 F.3d 963 (8th Cir. 2003), cert. denied, 541 U.S. 947 (2004).

Then petitioner filed a motion to recall the mandate in the Missouri Supreme Court (App. 201a). That court denied the motion (App. 213a), and this Court denied discretionary review. Taylor v. Missouri, 126 S.Ct. 737 (2005). On January 3, 2006, the Missouri Supreme Court set February 1, 2006 as petitioner's execution date.

On November 8, 2005, petitioner filed a petition in the Jackson County Circuit Court alleging that he was entitled to relief from his criminal judgment and sentence because of "fraud" in the post-conviction proceeding. On January 31, 2006, on the eve of the execution, the trial court conducted an evidentiary hearing and indicated it would rule on the petition on February 1, 2006. Also on January 31, 2006, the State filed a petition for writ of prohibition with the Missouri Supreme Court, and on February 1, it granted a preliminary writ. The Jackson County Circuit Court also denied the underlying petition on February 1, 2006. Petitioner did not appeal that judgment.

After briefing, the Missouri Supreme Court made the preliminary writ absolute. State ex rel. Nixon v. Daugherty, 186 S.W.3d 253 (Mo. banc 2006). The court summarily denied the motion for rehearing, and this Court denied review. 127 S.Ct. 493 (2006).

This Court has also denied discretionary review in a second motion-to-recall-the-mandate litigation, Taylor v. Missouri, 128 S.Ct. 871 (2008), and a state habeas litigation, Taylor v. Crawford, 546 U.S. 1161 (2006), and another state post-conviction litigation. Taylor v. State, 254 S.W.3d 856 (Mo. banc 2008), cert. denied, 129 S.Ct. 1037 (2009).

The court also denied a challenge to lethal injection as a means of execution. Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007), cert. denied, 128 S.Ct. 2047 (2008). Petitioner is relitigating the issue before the court of appeals. Clemons v. Crawford, No. 08-2895 (8th Cir.). He has also challenged the written protocol as volatile of the Missouri Administrative Procedure Act. Middleton v. Missouri Department of Corrections, 2009 WL 837696 (Mo. banc 2009).

Present Litigation

The present litigation began when petitioner filed a Motion to Recall the Mandate (App. 214a). On November 25, 2008, the Missouri Supreme Court denied the motion (App. 238a). From that denial, petitioner presents his ninth petition for writ of certiorari.

Facts Of The Crime

The Supreme Court of Missouri described the circumstances surrounding petitioner's offenses in the direct appeal opinion.

> According to Taylor's testimony at his guilty plea, Taylor's videotaped

statement and other evidence adduced in the sentencing hearing, Taylor and a companion, Roderick Nunley, spent the night of March 21, 1989, driving a stolen Chevrolet Monte Carlo, stealing "T-tops," smoking marijuana and drinking wine coolers. At one point during the early morning hours of March 22, they were followed by a police car, but lost the police after a high speed chase on a highway. About 7:00 a.m., they saw fifteen-year-old Ann Harrison waiting for the school bus at the end of her driveway. Nunley told Taylor, who was driving at the time, to stop so Nunley could snatch her purse. Taylor stopped the car, Nunley got out, pretended to need directions, grabbed her and put her in the front seat between Taylor and Nunley. Once in the car, Nunley blindfolded Ann with his sock and threatened to stab her with a screwdriver if she was not quiet. Taylor drove to Nunley's house and took Ann to the basement. By this time her hands were bound with cable wire. Nunley removed Ann's clothes and had forcible sexual intercourse with her. Taylor then had forcible intercourse with her. They untied her, and allowed her to dress. Ann tried to persuade them to call her parents for ransom, and Nunley indicated he would take her to a telephone to call home. They put the blindfold back on her and tied her hands and led her to the trunk of the Monte Carlo. Ann resisted getting into

the trunk until Nunley told her it was necessary so she would not be seen. Both men helped her into the trunk.

Nunley then returned to the house for two knives, a butcher knife and a smaller steak knife. Nunley argued with Taylor about whether to kill her. Nunley did not want Ann to be able to testify against him and emphasized he and Taylor were in this together. Nunley then attempted to slash her throat but the knife was too dull. He stabbed her through the throat and told Taylor to "stick her." Nunley continued to stab, and Taylor stabbed Ann "two or three times, probably four." He described how "her eyes rolled up in her head, and she was sort to like trying to catch her, her breath."

Nunley and Taylor argued about who would drive the Monte Carlo, and Nunley ended up driving it following Taylor who was driving another car. Taylor picked up Nunley after he abandoned the Monte Carlo with Ann Harrison in the trunk. They returned to Nunley's house where Nunley disposed of the sock, the cable wire, and the knives.

When the school bus arrived at the Harrison home to pick up Ann, the driver honked because she was not there. Mrs. Harrison looked out of the window and noticed Ann's purse, gym

clothes, books, and flute lying on the driveway. She waved for the bus to go on and began to look for her daughter. Police quickly mounted a ground and air search. Ann Harrison's body was discovered the evening of March 23rd when police found the abandoned Monte Carlo and a friend of the car's owner opened the trunk.

The State's physical evidence included hair matching Taylor's collected from Ann Harrison's body and the passenger side of the Monte Carlo, hair matching Ann's collected from Nunley's basement, sperm and semen belonging to Taylor found on Ann's clothes and body. An autopsy revealed a lacerated vagina, six stab wounds to Ann's chest, side, and back which penetrated her heart and lungs, and four stab wounds to her neck. The medical examiner testified Ann Harrison was alive when all the wounds were inflicted and could have remained conscious for ten minutes after the stabbing. She probably lived thirty minutes after the attack.

(App. 169a-171a).

ARGUMENT

Supreme Court Rule 10 informs the Court's exercise of discretion when considering a petition for writ of certiorari. Traditionally, the Court should grant review in situations where there is a conflict between the decision to be reviewed and decisions by other courts of appeals or state high courts, or where there is an important question of federal law that has not been, but should be settled by the Supreme Court. Petitioner does not show that there is a real conflict between the seven-word November 25, 2008 order of the Missouri Supreme Court (App. 238a) and the decisions of other courts. Petitioner does not contend the question has become more significant since the Court denied discretionary review on the same question in Taylor v. Missouri, No. 05-6135. This question does not warrant this Court's discretionary review; thus, the petition for writ of certiorari should be denied.

The Sentencing Issue

Petitioner disagrees with the Missouri Supreme Court's resolution of his contention that he was denied the Sixth Amendment right to jury sentencing in violation of Ring v. Arizona, 536 U.S. 584 (2002). Petitioner acknowledges that the Missouri Supreme Court has vacated other sentences on the basis of Ring (Petition, page 25), but he complains that the Missouri Supreme Court did not vacate his sentence when he did not have jury sentencing (Petition, pages 11-24). Petitioner asserts that this distinction is unfair. Petitioner's contention does not warrant certiorari review.

Initially, the Missouri Supreme Court's judgment is supported by an adequate and independent state ground. Michigan v. Long, 463 U.S. 1032 (1983). Under Missouri practice, a challenge to conviction and sentence should be brought to the attention of a Missouri appellate court on direct appeal or, if necessary, in a timely filed post-conviction motion under Missouri Supreme Court Rule 24.035. See State ex rel. Taylor v. Moore, 136 S.W.3d 799, 801 (Mo. banc 2004). Petitioner did not present a Sixth Amendment/Ring claim in his appeal from the trial court's denial to withdraw guilty plea. State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996), cert. denied, 519 U.S. 1152 (1997). On direct appeal, petitioner presented a claim that the state statute, §565.035.5, RSMo., required a jury for resentencing after the 1993 remand, id. at 218-19, but that claim was not grounded in the Sixth Amendment, but in state statute. Accordingly, the Missouri Supreme Court's 1996 decision, based on state law, was not overturned by a subsequent decision from the Supreme Court that applied retroactively, which is the state law criteria for a state appellate court to recall its mandate. State v. Whitfield, 107 S.W.3d 253, 265 (Mo. banc 2003); State v. Thompson, 659 S.W.2d 766, 768 (Mo. banc 1983). Because the state court's November 25, 2008 decision is grounded in principles of state law, there is no federal question for this court to review.

More importantly, petitioner's case is easily distinguishable from the situations where the Missouri Supreme Court has granted relief under principles from Ring. See State v. Whitfield, 107 S.W.3d at 253. Those situations involve the exercise of the right to jury trial and not a waiver; thus, a jury heard the penalty phase evidence but was

unable to decide punishment. E.g., State ex rel. Baker v. Kendrick, 136 S.W.3d 491 (Mo. banc 2004); State v. Thompson, 134 S.W.3d 32 (Mo. banc 2004); State ex rel. Mayes v. Wiggins, 150 S.W.3d 290 (Mo. banc 2004); State v. Buchanan, 115 S.W.3d 841 (Mo. banc 2003). In those cases, the offender had not waived the right to jury sentencing. In the present case, petitioner waived the right to jury sentencing at his February 8, 1991 plea of guilty.

The record amply demonstrates petitioner's waiver of any right to jury sentencing during the course of the plea of guilty. During the guilty plea proceeding, there were several colloquies concerning petitioner's understanding that he would be waiving the right to jury sentencing if he pled guilty.

> Q. Do you also understand that if you plead guilty it will be up to the Judge to decide the sentence on all charges?
>
> A. Yes.
>
> Q. And as the maximum that you can get on all of these charges, do you understand that the Judge can give you the death sentence?
>
> A. Yes.

(Guilty Plea Tr. 8-9). Not only did petitioner understand that a guilty plea allowed the judge to sentence him, he also understood that a not guilty plea led to a jury.

Q. If you plead not guilty, do you understand that you have a right to go to trial.

A. Yes.

Q. And if you plead not guilty, there would be a trial.

A. Yes.

Q. Do you understand that the trial would be in front of a jury of twelve people.

A. Yes, I do.

Q. And the twelve people would have to be unanimous in their verdict?

A. Yes.

Q. In other words, all twelve would have to agree.

A. Yes.

Q. The twelve people would have to be convinced beyond a reasonable doubt by the state that you're guilty.

A. Yes.

Q. And that would be on each charge, all four counts; do you understand that?

A. Yes, I do.

(Guilty Plea Tr. 9-10). Petitioner understood that by pleading guilty he was waiving this right.

> Q. Michael, do you understand that if you plead guilty there won't be a trial?
>
> A. Yes, I do.
>
> Q. And you, in essence, would be giving up those rights. Do you understand that?
>
> A. Yes, I do.
>
> Q. Sometimes we use the word waive. If you plead guilty, you are waiving the right to a trial by a jury.
>
> A. Yes, I understand.
>
> Q. The right to a trial.
>
> A. Yes, I understand.

(Guilty Plea Tr. 13). Petitioner also understood that after pleading guilty, there would be a sentencing proceeding before the judge where the State would be seeking capital punishment.

> Q. Has anyone made any promises to you about how this is going to turn out if you plead guilty?
>
> A. No, they haven't.

Q. You know that if you plead guilty the state is going to ask for a death sentence and the Judge could impose death.

A. Yes, I do.

Q. Now, if you plead guilty, do you understand that all that would be left for the Court to do would be to sentence you?

A. Yes.

* * * * * * *

Q. (By Mr. McClain) Do you understand, Michael, that there would still be a sentencing hearing where the state will be presenting evidence, and we, on your behalf, will be presenting evidence to the Judge as to what sentence to propose on the murder charge?

A. Yes.

Q. And actually the Judge can entertain evidence on all of the charges.

A. I understand.

(Guilty Plea Tr. 19-21). The proceedings continued:

Q. And do you understand that there will be a sentencing proceeding yet to occur in front of the Judge?

A. Yes, I do.

(Guilty Plea Tr. 28). The details of the jury sentencing that petitioner was waiving were fully aired on the record.

Q. No one has guaranteed you what sentence you're going to receive?

A. No.

Q. No promises have been made to you as to what sentence you're going to receive?

A. No, they haven't.

Q. Has anyone told you what sentence you're likely to receive?

A. No, they haven't.

Q. What sentence do you think you're going to receive as to Count I, murder in the first degree?

A. What sentence do I think?

Q. Yes.

A. I don't know.

Q. Do you understand that the Judge might very well sentence you to the death penalty in this case?

A. Yes, I do.

Q. Do you know that by pleading guilty here today that instead of twelve people deciding, there will only be one person deciding, this Judge; do you understand that?

A. Yes, I do.

Q. As to the other counts, the Judge could sentence you to the minimum, or he may very well sentence you to the maximum on each of the other counts charged; do you understand that?

A. Yes.

(Guilty Plea Tr. 35-36). The questioning continued:

Q. Now, the second phase would be a separate trial in front of the same jury, if they do find you guilty of murder in the first degree. Do you understand that?

A. Yes, I do.

Q. It would be like a trial. There would be opening statements. The state would present evidence, and you could present evidence. Do you understand that?

A. Yes, I do.

Q. You would have a right to confront the witnesses, to subpoena witnesses, to

subpoena witnesses in. Do you understand that?

A. Yes.

Q. The Court would then instruct the jury, the attorneys would argue, and then they would deliberate, the jury would deliberate. Do you understand that?

A. Yes.

Q. During their deliberations, all twelve jurors must find, beyond a reasonable doubt, at least one aggravating circumstance. Do you understand that?

A. Yes.

Q. And if they don't find at least one aggravating circumstance, then they must sentence you to life without parole. Do you understand that?

A. Yes.

Q. Now, the state has filed notice of nine aggravating circumstances, statutory aggravating circumstances. Do you understand that?

A. Yes.

Q. Have you talked about those with your attorney; have you seen those?

A. I'm not real familiar with seeing them, but I have talked with them about them.

Q. When I say that the jury must find at least one, they must find at least one statutory aggravating circumstance. If they don't, it's life without parole. Do you understand that?

A. Yes.

Q. If they do find at least one statutory aggravating circumstance, then they can determine if there are any non-statutory aggravating circumstances. Do you understand that?

A. Yes.

Q. And the state has filed notice, I believe, of twenty-five or twenty-six non-statutory aggravating circumstances. Are you aware of that?

A. Yes.

Q. And then the jury would determine if the statutory aggravating circumstances non-statutory aggravating circumstances and the evidence in the case, whether they warrant the death penalty. Do you understand that?

A. Yes.

Q. And they must unanimously find that they do warrant the death penalty. Do you understand that?

A. Yes.

Q. And if they don't, then it's life without parole. Do you understand that?

A. Yes, I do.

Q. And then if they find that there are sufficient aggravating circumstances to warrant death, then they must consider whether there are mitigating circumstances. Do you understand that?

A. Yes, I do.

Q. And your attorney has supplied me with notice of five statutory mitigating circumstances that would be presented to the jury; do you understand that?

A. Yes.

Q. And the jury would then consider whether those mitigating circumstances, or the evidence in the case, whether it outweighs the aggravating circumstances. And if they found that the mitigating circumstances outweigh the aggravating circumstances, then they must sentence

you to life without parole. Do you understand that?

A. Yes.

Q. And do you understand that when they consider the mitigating circumstances that they don't have to all unanimously find the same mitigating circumstances; do you understand that?

A. Yes.

Q. And do you understand that even if they find that the mitigating circumstances do not outweigh the aggravating circumstances that they still are not obliged to sentence you to death; do you understand that?

A. Yes.

Q. The final decision would rest with the jury. Do you understand that?

A. Yes.

Q. But again in this case it will all be up to one man. Do you understand that?

A. Yes.

Q. Is that what you want?

A. Yes, it is.

(Guilty Plea Tr. 38-42). The record amply demonstrates petitioner's knowing and voluntary waiver of the jury sentencing when he entered his February 8, 1991 plea of guilty. Given petitioner's plea and waiver, the Missouri Supreme Court's November 25, 2008 order denying the motion to recall the mandate is proper.

With this record of petitioner's waiver of jury sentencing, it is indeed ironic that petitioner now suggests that his Sixth Amendment right to jury sentencing was violated by the Missouri trial court. The record amply reflects that petitioner pled guilty in order to avoid the jury's participation in sentencing. See Taylor v. Bowersox, 329 F.3d 963, 973 (8th Cir. 2003), cert. denied, 451 U.S. 947 (2004). Given the nature of the murder as outlined earlier, petitioner's motivation is understandable.

Petitioner's current claim is also ironic because, on direct appeal, petitioner complained that his guilty plea was not knowing because there remained a remote possibility of jury sentencing under §565.006.2, RSMo. 1986, even though he pled guilty and waived jury sentencing. State v. Taylor, 929 S.W.2d at 217. The Missouri Supreme Court properly found on direct appeal that petitioner's complaint was ephemeral because the State did not actually agree to jury sentencing after the guilty plea as was theoretically possible under §565.006.2, RSMo. 1986. Oddly, petitioner now complains that he was denied jury sentencing when it was something he was avoiding at the time of sentencing.

Petitioner contends that §565.006.2, RSMo. 1986 is unconstitutional because the statute deprives

capital defendants of their right to jury sentencing following a guilty plea (Petition, pages 11-24). But in the present case, the record amply reflects petitioner's waiver of the jury's determination of guilt and sentencing. When an offender pleads guilty, it is the judge who determines the defendant's guilt due to the waiver of a jury trial during the guilty plea proceeding. Nothing in this Court's line of cases after Apprendi v. New Jersey, 530 U.S. 466 (2000) abolishes the ability of a defendant to knowingly and voluntarily waive a right.

Petitioner contends that this conclusion conflicts with that of the Colorado Supreme Court in Colorado v. Montour, 157 P.3d 489 (Col. 2007) (en banc) (Petition, pages 18-19). The Colorado Supreme Court concluded that Col. Rev. Stat. Ann. §18-1.3-1201(1)(a) (2008) was unconstitutional because it failed to require a knowing, voluntary and intelligent waiver of a jury at sentencing because, under the statute, the waiver was automatic when the defendant pleaded guilty (Petition, page 18 quoting Colorado v. Montour, 157 P.3d at 492). In contrast, as discussed in detail earlier, petitioner knowingly, voluntarily and intelligently waived the presence of a jury at sentencing. Similarly, as petitioner points out, the South Dakota Supreme Court upheld a sentencing where it was clear from the record that the offender waived his right to jury sentencing. South Dakota v. Page, 709 N.W.2d 739, 763 (S.D. 2006).

Petitioner contends that his waiver was not "knowing" because the Court had not yet issued its decision in Ring v. Arizona, 536 U.S. 584 (2002) at the time of petitioner's guilty plea in 1991. But petitioner had the right to jury sentencing before his

guilty plea with the source of that right, at the very least, being Missouri state statute, §565.030.4, RSMo. 1986. Petitioner does not suggest that in order for a waiver of rights to be effective, the source of the right must be accurately identified and described. And the present case amply demonstrates the rationale for not having such a rule. As outlined, it was clear that petitioner knowingly and voluntarily waived jury sentencing regardless of whether the source of that right was Missouri rule, Missouri statute, Missouri case law, the federal constitution, federal statute or federal case law.

Petitioner attempts to manufacture a second question (Petition i) on the topic of whether this Court's decision in Ring v. Arizona applies retroactively (Petition, pages 24-31). This Court has answered that question in the negative for federal habeas corpus challenges to a conviction and sentence. See Schriro v. Summerlin, 542 U.S. 348 (2004). The Court has left the question to the states to answer for their state post-conviction proceedings. Danforth v. Minnesota, 128 S.Ct. 1029 (2008). The Missouri Supreme Court has resolved that question for legitimate Ring claims in favor of capital offenders. State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003).

Petitioner suggests that the Missouri Supreme Court erroneously denied his motion to recall the mandate. But petitioner does not show that the seven-word order from the Missouri Supreme Court was an erroneous application of either Schriro or Danforth. Instead, the Missouri Supreme Court's summary denial of the motion to recall the mandate is most likely based on petitioner's persistent waiver of jury sentencing in 1991. This case does not

present either a conflict between courts or a significant federal question that has not been, but that should be resolved by this court. Supreme Court Rule 10.

CONCLUSION

Respondent respectfully requests the court deny the petition for writ of certiorari.

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